VENAJA RAJOO

v.

R RAVINDRAN RAMASAMY III

HIGH COURT MALAYA, MELAKA
KN SEGARA J
[ORIGINATING SUMMONS NO: 24-564-2000]
4 APRIL 2001

FAMILY LAW: *Children - Custody - Custody of newborn infant - Rebuttable presumption that children under age seven should be with its mother - Law Reform (Marriage and Divorce) Act 1976, s. 88(3) - Mother of infant unemployed - Whether should be held against her - Whether defendant proved that welfare and health of infant will be at serious risk if left with its mother - Whether failure to breastfeed a baby should be made a ground to deny the mother custody - Whether infant's health and welfare would be compromised, prejudiced or made to suffer if custody granted to its mother*

FAMILY LAW: *Marriage - Marriage by Hindu rites - Customary marriage not registered - Whether valid - Whether there was dispute that the parties were legally married - Whether court has jurisdiction to entertain plaintiff's application for custody - Law Reform (Marriage and Divorce) Act 1976, s. 34*

The plaintiff and the defendant were married according to traditional Hindu rites but to date the customary marriage has not been registered pursuant to the Law Reform (Marriage and Divorce) Act 1976 ('the Act'). The plaintiff had pursuant to s. 88 of the Act applied for custody of the infant child as a result of her marriage to the defendant. The defendant resisted the plaintiff's application for custody of the infant child on these grounds: (1) the plaintiff has no interest in the son; (2) if the court gave her custody she might sell his son; (3) his son is unfamiliar with the plaintiff and the son would suffer emotional distress and (4) the plaintiff is unemployed and is in no position to look after his son.

Held:

[1] By virtue of s. 34 of the Act, the customary marriage solemnised between the plaintiff and the defendant was valid. It should not be declared as invalid because it was not registered. There was no dispute that the plaintiff and the defendant are legally married to one another. Thus, this court has jurisdiction to entertain the plaintiff's application for custody of the newborn infant under s. 88 of the Act.

[2] Under s. 88(3) of the Act there is a rebuttable presumption that it is for the good of the child below the age of seven years to be with the mother. The care and supervision that a mother who is not working can give to her infant is an important factor for consideration in all custody cases. In this instance, the fact that the mother is unemployed should not be held against her but rather held in her favour as she will be able to devote all her time and energy to the tender loving care of the infant child during the vital period of nurture.

[3] An overwhelming case would have to be shown before a newborn infant can be deprived of the society of its mother. The defendant will have to come close to proving that the health or welfare of the infant would be put at serious risk if left with the mother. This, the defendant has failed to prove upon an objective evaluation of all the affidavit evidence before the court.

[3a] The husband's objections to his wife having the baby with her is not only a long way from what the law requires, but also seems to display some imagined apprehensions about the mother's genuine love and affection for her flesh and blood emanating from some alleged statements made by her, before the child was born and her failure to breastfeed the infant. A failure or refusal to breastfeed an infant should never be a ground to deny a mother custody of her infant. Further, the alleged statements made by the mother should be treated of no consequence unless further supported by solid and real evidence that the infant's health or welfare is at risk.

[4] The court is satisfied that neither the infant's health nor welfare will be compromised, prejudiced or made to suffer by the mother. Therefore, custody must be granted to the mother of the infant.

[Order accordingly.]

Case(s) referred to:
K Shanta Kumari v. Vijayan [1986] 2 MLJ 216 ***(refd)***
Re Balasingam & Paravathy, Infants Kannamah v. Palani [1970] 2 MLJ 74 ***(dist)***
Re Orr [1973] 2 DLR 77 ***(refd)***

Legislation referred to:
Law Reform (Marriage and Divorce) Act 1976, ss. 34, 88(3)

For the plaintiff - Mr Sekar; M/s Sault & Co
For the defendant - DA Devadason; M/s Devadason & Devadason

Reported by Suhainah Wahiduddin

JUDGMENT

KN Segara J:

The plaintiff and the defendant were married according to traditional Hindu rites at Dewan Hang Tuah Melaka on 15 March 1997 but to date the customary marriage has not been registered pursuant to the Law Reform (Marriage and Divorce) Act 1976 (hereinafter referred to as "the Act"). Section 34 of the Act does not render invalid a valid customary marriage by reason of it not having been registered under the Act. It reads as follows:

> Nothing in this Act or the rules made thereunder shall be construed to render valid or invalid any marriage which otherwise is invalid or valid merely by reason of it having been or not having been registered.

By virtue of s. 34 of the Act I hold the customary marriage solemnised between the plaintiff and the defendant on 15 March 1997 as valid. It should not be declared as invalid because it was not registered. There is no dispute that the plaintiff and the defendant are legally married to each other. In the circumstances, the *ratio decidendi* in *Re Balasingam & Paravathy, Infants Kannamah v. Palani* [1970] 2 MLJ 74 is not applicable to the present case to oust the jurisdiction of this court to entertain the application for custody of the newborn infant by the mother, in these proceedings before me. It must be noted that in deciding *Re Balasingam, supra,* the learned judge had assumed for purposes of that case that there was no valid marriage. I hold that this court has jurisdiction to entertain the plaintiff's application herein, for custody under s. 88 of the Act.

On 13 March 2000 a baby boy was born to the plaintiff by Caesarian delivery at the Melaka Hospital. There is no dispute that the defendant is the father of the child. The child was named Karthikraja. The parents of the plaintiff live in Tangkak, Johor while the parents of the defendant lived in Melaka. It would appear that after their marriage the plaintiff and the defendant lived together with the defendant's parents in Melaka. The plaintiff and defendant did not establish a matrimonial home of their own in Melaka. This could have been largely due to financial constraints coupled with filial obligations and loyalty on the part of the defendant to his aged parents and, it suited the defendant to live together with his parents in their house. The defendant works as a Bell-boy at a hotel in Melaka earning about RM700 per month. The plaintiff is unemployed.

Soon after the birth of the infant on 13 March 2000, the plaintiff requested the defendant to send her, together with the infant, to her mother's house in Tangkak till her recovery. The defendant did not entertain this request and so after her discharge from the hospital she returned to the defendant's parents' house in Melaka. There, she was taken care of by her mother-in-law for about

ten days and, thereafter, she was obliged to take care of herself and her newborn infant without any help from anyone else. She also had to do the cooking. In such circumstances, the plaintiff again asked the defendant permission to allow her and the infant to stay at her mother's house in Tangkak until she fully recovered her strength and health from the strains and pain of the Caesarian delivery of her first child. Again, the defendant refused. This led to misunderstandings and quarrels with her mother-in-law as well as with the defendant. The plaintiff became stressed and charged with emotion and pressure. Unable to endure the situation anymore, the plaintiff, on 8 April 2000, resolved that she would leave her mother-in-law's house together with her infant and set off to her mother's house. The defendant objected to the plaintiff's plans and then asked her to leave the house, sans the infant. The plaintiff felt she was left with no choice but to proceed to her mother's house alone on 8 April 2000, leaving the infant behind with the defendant and his mother. Thereafter, until 8 May 2000 the plaintiff travelled from Tangkak to Melaka to see the infant but the plaintiff alleges her mother-in-law prevented her from getting close to the infant. Finally, when she went to visit the infant on 9 May 2000, obviously with the intention of taking the infant of about two months old (at that time) back with her to her mother's house, she met with resistance from the defendant and his mother. She returned to Tangkak and lodged a police report in Tangkak on 11 May 2000. The material parts of the said report reads as follows:

> Pada jam 1/kurang 7.00 malam 9/5/2000, saya sampai rumah suami saya ... untuk tengok anak saya bernama ... berusia 2 bulan yang berada ..., tetapi suami saya berkasar dengan memukul badan saya dengan tangan dan menolak saya dan tidak mahu memberi anak saya dukung dan menyusu. Masa itu anak saya cukup lapar dan menangis. Saya terus ambil anak saya untuk membawa balik bersama-sama dengan saya ke rumah emak saya di Tangkak. Dengan cepat suami saya menghalang dan tolak saya sambil pukul saya dengan tangan. Saya terus ke Balai Polis Klebang untuk membuat repot. Di Balai pun suami saya membuat kecoh dan mengambil kad pengenalan saya. Melihat keadaan ini saya terus balik ke Tangkak.
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> Setelah keadaan badan saya sihat sedikit dan fikiran tenang saya ke Balai Tangkak untuk buat laporan bagi mendapatkan hak penjagaan anak saya. Saya juga bimbang tentang keselamatan anak saya sekarang dijaga oleh mertua saya yang sedang uzur dan mengidap berbagai penyakit, lebih-lebih lagi anak saya yang terlalu kecil dan perlukan susu. Saya takut ...
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> (exh. D, encl. 3)

The defendant resists the plaintiff's application for custody of the child. His main grounds can be summarised as follows:

1) The plaintiff has no interest in the son;

2) If the court gave her custody, she might sell his son;

3) His son is unfamiliar with the plaintiff – his son would suffer from emotional distress;

4) The plaintiff is unemployed and is in no position to look after his son.

To elaborate the above, this is what the defendant said in his affidavit:

> 4. The plaintiff has no interest in our son. Whilst she was expecting she told me that there was a family in Singapore who were prepared to pay for her maternity bills including hospitalisation and they would pay a certain sum of money if we sold the child to them ... I am extremely apprehensive and worried that should the Court give her custody, she might sell my son ... .
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> 8. To give the plaintiff custody would cause our son emotional distress as he is unfamiliar with the plaintiff. Furthermore, it would be cruel to place our son in a strange environment. The plaintiff being unemployed is in no position to look after our son. If she wants she can return to the house. But to give custody to the plaintiff would only be endangering our son, as I am afraid she might sell our son and disappear. I trust ... .

It is very clear to my mind that the defendant has failed to recognise and appreciate the pain, stresses and strains of pregnancy and child-birth experienced by the plaintiff as well as her natural inclination and desire to convalesce and recuperate after a Caesarian delivery under the care and comfort of her own mother in Tangkak rather than her mother-in-law in Melaka. To my mind, this was the primary cause for the present matrimonial tension between the plaintiff and defendant, aggravated by the over-bearing attitude and insistence of the defendant that the plaintiff should live with his parents at their home because of his own filial loyalty and financial responsibilities towards them.

Under s. 88(3) of the Act there is a rebuttable presumption that it is for the good of the child below the age of seven years to be with his or her mother. The reasons why the law insists that *de facto* care, control and custody of children under the age of seven years should be given to the mother have been dealt with in a number of cases and I do not think it is necessary for me to cite all of them here. In *Re Orr* [1973] 2 DLR 77, Muloch CJ commented:

> In the case of a father and mother living apart and each claiming the custody of a child, the general rule is that the mother, other things being equal, is entitled to the custody and care of a child during what is called the period of

> nurture, namely, until it attains about seven years of age, the time during which it needs the care of the mother more than that of the father ... .

The care and supervision that a mother who is not out at work can give to her infant is an important factor for consideration in all custody cases. In this case, the fact that the mother is not employed should not be held against her but rather held in her favour as she will be able to devote all her time and energy to the tender loving care of the infant during the vital period of nurture. The father ought to remember and be reminded that he is legally and morally obliged to maintain the infant, irrespective of whoever has custody of the infant. I am entirely in agreement with Wan Yahya (as he then was) in *K Shanta Kumari v. Vijayan* [1986] 2 MLJ 216 when he said:

> Even going on the assumption that both parents are equally capable of providing the care, comfort and attention to the infant, the courts have always leaned in favour of the mother being given custody of young infants. The reason is very obvious. An infant of tender age is by nature more physically and spiritually dependant on its own mother than anyone else.

An overwhelming case would have to be shown before a newborn infant can be deprived of the society of its mother. The defendant will have to come close to proving that the health or welfare of the infant would be put at serious risk if left with the mother. This, the defendant has failed to prove, upon an objective evaluation of all the affidavit evidence before me. The husband's objections to his wife having the baby with her is not only a long way from what the law requires, but also seems to display some imagined apprehensions about the mother's genuine love and affection for her own flesh and blood emanating from some alleged statements made by her, before the child was born, and her failure to breastfeed the infant. A failure or refusal to breast-feed an infant should never be a ground to deny a mother custody of her infant. Further, the alleged statements made by the infant's mother should be treated of no consequence unless further supported by solid and real evidence that the infant's health or welfare is at risk, in the hands of the mother. I am entirely satisfied that neither the infant's health nor welfare will be compromised, prejudiced or made to suffer by the mother. In the circumstances, custody must be granted to the mother of the infant. Nevertheless, the father is always at liberty to apply to court under the Act, to remove the infant from the custody of the mother at any time should the circumstances warrant such removal, arising from any act, default, neglect or omission by the mother in regard to the health or welfare of the infant.

Order accordingly.